

NO. \_\_\_\_\_

**In The**  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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**JOHN DILEO**  
*Petitioner*

v.

**UNITED STATES OF AMERICA**  
*Respondent*

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**APPENDIX**

**APPENDIX (1)**

**OPINION OF THE UNITED STATES  
DISTRICT COURT (HON. ELLEN B.  
BURNS) dated September 17, 1982**

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

IN RE: :  
GRAND JURY SUBPOENA : MISC. N.H. 424  
(DILEO BROTHERS, INC.) :

RULING ON GOVERNMENT'S  
MOTION FOR IN CAMERA  
EVIDENTIARY HEARING

The Grand Jury issued a subpoena duces tecum to DiLeo Brothers, Inc. seeking certain business records. DeLeo Brothers, Inc., through its president John DiLeo, Jr., resisted the subpoena on the grounds that some of these records are held by a family partnership. A new subpoena was then served on John DiLeo, Jr., as partner, who claims that these records are privileged under the fifth amendment.

The Government and Mr. DiLeo agree

that the court should hold an in camera evidentiary hearing to determine whether Mr. DiLeo may invoke a fifth amendment privilege with respect to the partnership records. They disagree, however, over the format of the proceeding. The Government urges the court to permit an Assistant United States Attorney, unconnected with the investigation, to be present. Mr. DiLeo's testimony at the hearing would be privileged; the transcript of the hearing would be privileged; the transcript of the hearing would be sealed; and the Assistant United States Attorney would be subject to a protective order.

Mr. DiLeo argues that his fifth amendment privilege can only be guaranteed by an ex parte hearing, as suggested in In re Katz, 623 F.2d 122, 127 (2d Cir. 1980). In Katz, the court ordered an in camera hearing at which the party's

testimony would be privileged. Katz also referred to Matter of Grand Jury Empanelled February 14, 1978, 603 F.2d 469, 474-75 (3d Cir. 1979), where the hearing was ex parte.

In an ex parte evidentiary hearing, the court would be obliged to take an active role, soliciting testimony about Mr. DiLeo's relation to the family partnership and the basis for his fifth amendment claim. The presence of an Assistant United States Attorney would, in addition to providing representation for the grand jury, relieve the court of this burden.

Mr. DiLeo's testimonial privilege can be protected by court order. If that court order should ever be violated, appropriate sanctions may be taken, including disciplinary sanctions against the offending official or dismissal of charges based upon evidence obtained in



violation of the privilege.

Then District Judge Newman in In re Cardassi, 351 F. Supp. 1080, 1082 (D. Conn. 1972), dealt with a similar need to protect the fifth amendment privilege of a grand jury witness who had been immunized but feared foreign prosecution. The court noted that "If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside." The Cardassi court, however, rejected the government's argument that grand jury secrecy and judicial control could adequately protect the immunized witness from foreign prosecution. Contra In re Baird, 668 F.2d 432, 434 (8th Cir.),

cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 102 S. Ct. 2255 (1982), and other cases cited therein.

The facts of this case are clearly distinguishable from those of Carusi. First, Mr. DiLeo does not allege any fear of foreign prosecution. Second, there is less danger that the testimonial privilege of an in camera hearing will be violated than that of a grand jury proceeding. Third, the presence of an Assistant United States Attorney protects the court's neutrality.

We hold, therefore, that there is no real danger that the presence of an Assistant United States Attorney, unconnected with the investigation and subject to a protective order, would endanger Mr. DiLeo's fifth amendment privilege. The Government's motion is granted.

An in camera evidentiary hearing

shall be scheduled for 4:00 p.m., October  
13, 1982.

SO ORDERED.

/s/ Ellen Bree Burns  
ELLEN BREE BURNS  
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this  
17th day of September, 1982.



**APPENDIX (2)**

**MOTION AND ORDER OF THE UNITED  
STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT (HON. WILFRED  
FEINBERG, HON. RICHARD J.  
CARDAMONE AND HON. OSCAR H.  
DAVIS) dated January 11, 1983**

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

102 1 6781

Order Number

In Re:  
Grand Jury Subpoena  
(Dillon Brothers, Inc.)

NOTICE OF MOTION

Dismissal of Appellant's  
Appeal

Shall state

ISSUING BY: (Name and title of attorney in charge)  
Peter A. Clark, Assistant United States  
Attorney, PPS 6-645-2108

Has opposing counsel consented? ☐ Yes ☒ No  
Has service been effected? ☐ Yes ☒ No  
Is oral argument desired? ☐ Yes ☒ No  
(Indicate reasons only)

Remitted return date  
(See General District Rule 171(a))

Date of argument of appeal, if scheduled:

OPPOSING COUNSEL: (Name and title of attorney in charge)  
Robert J. Leones, Esquire  
(203) 249-6540

ISSUING BY: (Name and title of attorney in charge)  
A. DANIEL FARRAGO, CLERK  
Has request for oral been made below?

Has request for oral been made below?  
The P.A.A.P. Rule 17 ☐ Yes ☒ No  
Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If no, explain why not:

Judge or judges whose order is being appealed:  
Ellen Bree Burns, U.S. District Judge, District of Connecticut

Full statement of the relief requested:

Dismissal of Appellant's Appeal

Previous requests for similar relief and disposition:  
None

Statement of the issue(s) presented by this motion:

Whether the District Court's Order appealed from is a final order under Title 28, United States Code, Section 1291.

Full statement of the facts and circumstances to which the motion applies: Appellant Dillon moved in the District Court to quash a grand jury subpoena directing him to produce certain partnership records. The District Court granted the United States' motion for an in camera hearing on Dillon's motion, at which Dillon's testimony would be privileged and at which an Assistant United States Attorney, under a protective order, would be allowed to represent the grand jury. Dillon appeals the District Court's ruling, seeking, essentially, to prevent the presence of the Assistant United States Attorney at the hearing. (P.L. Memorandum in Support of Motion to Dismiss and Ex. B).

Summary of the argument: Full page references to the moving papers:

The District Court's ruling and order scheduling the hearing on Dillon's motion to quash is not a final order appealable under Title 28, United States Code, Section 1291.

October 22, 1992

PETER A. CLARK  
ASSISTANT UNITED STATES ATTORNEY

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted without prejudice.

A. Daniel Farrago, Clerk

by Robert J. Leones, Deputy Clerk



BEFORE: HON. WILFRED PETERBERG, CH. J.

HON. RICHARD J. CARDAMONE

Jan. 17, 1993 HON. OSCAR W. DAVIS (FED. CIR.)